United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-1073

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

EDUARDO BERMUDEZ, JORGE VIVAS and ISRAEL DIAZ-MARTINEZ, :

Appellants. :

- -X

On appeal from the United States District Court for the Eastern District of New York

PETITION FOR REHEARING ON BEHALF OF EDUARDO BERMUDEZ AND APPENDIX

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- against -	:	Petition for Rehearing on Behalf of Appellant Eduardo Bermudez
EDUARDO BERMUDEZ, JORGE VIVAS and ISRAEL DIAZ-MARTINEZ,	:	
Appellants.	:	

To: The Honorable Judges of the Panel: Hon. Waterman, Hon. Oakes, Hon. Meskill, Judges of the United States Court of Appeals for the Second Circuit

The Petitioner, Eduardo Bermudez, by Charles Sutton, his attorney, respectfully requests an en banc hearing because of the vital importance of the issue of construction of 21 U.S.C. Section 846, and shows:

Point I

This Court has overlooked the applicable law in construing 21 U.S.C. Section 846.

It is respectfully submitted that the construction of 21 U.S.C. Section 846 by this Court, in the final analysis, is based essentially on United States v. Gardner, 202 F. Supp. 256 (N.D.Cal. 1962), since the cases cited relied upon Gardner. It is respectfully submitted that those cases are not authority for the momentous and far-reaching holding made by this Court that 21 U.S.C. Section 846 is a per se substantive offense of conspiracy and as such does not include an overt act as an essential element

thereof. In United States v. Gardner, 202 F. Supp. 256 (N.D.Cal. 1962), the defendant moved to dismiss the conspiracy count of the indictment on the ground that the count alleged no overt act. In Gardner, the statute at issue for construction was 21 U.S.C. Section 174; that statute, as written, included the words "or conspires" in the same statute which set out the substantive offenses. The Gardner court, relying on that fact, and the report of Congressional intent set forth in 1951 U.S. Code Cong. & Adm. Service, Vol. 2, pg. 2602, 2603, which included the statement: "A conspiracy to commit violations of the above laws would be considered a specific offense", and on a similar colocation of similar words within the statute defining the substantive offense in the Selective Training and Service Act of 1940 and the case of Singer v. United States, 323 U.S. 338, concluded that Congress intended to make a conspiracy under 21 U.S.C. Section 174 an offense separate from "the ambit of 18 U.S.C. Section 371".

As more particularly shown below, 18 U.S.C. Section 846 is not the same as 21 U.S.C. Section 174, either in language, or in format, or in relative position to other sections in the subchapter or in the Legislative History of the Comprehensive Drug Abuse and Control Act of 1970, hereinafter Drug Control Act of 1970. "The descriptions of the offenses were changed in the new Act and different penalty provisions were provided consistent with the new structure and scheme of the 1970 Act." United States v. McGarr, 461 F. 2d 1, 4 (7th Cir. 1972). 18 U.S.C. Section 846 bears no resemblance to 21 U.S.C. Section 174. United States v. Gardner, 202 F. Supp. 238 has no application to the problem of

construction of 21 U.S.C. Section 846 and it is not authority that 21 U.S.C. Section 846 is a "substantive offense", a per se crime and does not include an overt act as an essential element thereof.

While this Court referred to and relied on cases which relied on Gardner as to the construction of 21 U.S.C. Section 174, this Court overlooked two decisions by highly respected District Judges in this Second Circuit which construed 21 U.S.C. Section 174 as requiring the allegation of an overt act in a conspiracy count, and proof thereof for conviction, and this Court's own affirmance in one of those cases. This Court overlooked the decision of the highly respected District Judge Edward Weinfeld of the Southern District of New York in United States v. McKenny, 181 F. Supp. 143, affirmed sub. nom. United States v. Galgano, 281 F. 2d 908 (2d Cir. 1960). District Judge Weinfeld held that "the crime of conspiracy is defined only in Section 37 of Title 18," (underscoring added), to wit:

> "Petitioners proceed on the assumption that Congress by the inclusion of the words 'or conspires' under the 1951 amendments to Section 174 of Title 21 and Section 7237(a) of Title 26, created a new, separate and distinct crime of conspiracy. The amendments to those sections simply related to the matter of punishment and did not create a new crime. The crime of conspiracy is defined only in Section 371 of Title 18. No definition appears in other sections. Thus it was proper to refer to the general conspiracy statute in the indictment..." United States v. McKenny, 181 F. Supp. 143, 146 (S.D.N.Y. 1959), affirmed sub. nom. United States v. Galgano, 281 F. 2d 908 (2d Cir. 1960).

This Court, in its decision affirming the District Court, showed that it approved the determination of the District Court, even though it stated that it "did not reach the question whether Con-

spiracy Count 14 was in fact duplicitous" in charging a violation of both 18 U.S.C. Section 371 and 21 U.S.C. Section 174 and 26 U.S.C. Section 7237(a). This Court held that "the matters the Government would be required to prove" under either 18 U.S.C. Section 371, or under 21 U.S.C. Section 174, "would be the same", thus showing that an overt act was an essential element of a drug conspiracy offense and that an overt act was required to be alleged in the indictment:

> "Appellants seek to show that in the preparation of their defense they were prejudiced, and were further prejudiced by the judge's charge to the jury that Count 14 was 'bottomed' upon 18 U.S.C. Section 371. As to the first point, we see no way in which a defense to an accusation under 18 U.S.C. Section 371 would differ from a defense to a combined accusation of conspiracy in violation of 21 U.S.C.A. Section 174 and 26 U.S.C. Section 7236(a). In each case, the matters the Government would be required to prove, and the statutory presumptions the defendant might be required to rebut would be the same. As to the judge's charge, apparently appellants would have us believe that the jury could have been led to convict on a lesser quantum of evidence because appellants would receive lesser penalties under 18 U.S.C. Section 371. We certainly cannot attribute to the jury such improper conduct." United States v. Galgano, 281 F. 2d at 911.

This Court also overlooked the decision of District Judge Timbers, (now, Circuit Judge of this Court) in United States v. Somohano, 193 F. Supp. 201, 204 (D. Conn. 1961) which held that a charge of conspiracy to violate 21 U.S.C. Section 174 was an offense under 18 U.S.C. Section 371, the general conspiracy statute; and thus, by definition that an overt act was an essential element of that offense and was required to be alleged in the indictment.

Turning back to the cases referred to by this Court as "some authority to the effect that proof of an overt act is not a

necessary element of a conspiracy charged under 21 U.S.C. Section 846" (Decision, Docket Nos. 75-1073, 75-1022, 75-1379, pp. 445, 446).

1. United States v. Tramunti, 513 F. 2d 1087, 1113 (2nd Cir. 1975) is not authority for the proposition stated because this Court in the body of its decision, as distinguished from a note, stated just the opposite of the proposition suggested in the note, namely: "...in the case of a conspiracy, it has been held that at least one overt act must be set forth. Cf. United States v. Grunewald, 353 U.S. 391, 396-397". (513 F. 2d at 1113), and that an overt act was an 'element of the offense charged':

> "An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereb apprising defendant of what he must be prepared to meet... Under this test, an indictment need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crimes...although it has been held that at least one overt act must be set forth... Here the indictment followed the language of the conspiracy statute, stated in broad terms the time and place of the crime, and specified some 17 overt acts in furtherance of the crime. The Government was not required to provide in the indictment a detailed statement of all the parties with whom Mamone was alleged to have had dealings during the term of the conspiracy..." (Underscoring added). United States v. Tramunti, 513 F. 2d 1087, 1113 (2d Cir. 1975),

and, by definition, that an overt act must be alleged in the indictment charging a conspiracy offense to violate the Drug Control Act of 1970.

2. United States v. De Viteri, 350 F. Supp. 550, 552 (E.D. N.Y. 1972), construed 21 U.S.C. Section 846 by equating it to 21 U.S.C. Section 174 and then following Gardner. 21 U.S.C. Section 846 is completely different in language and in colocation in the

Drug Control Act of 1970 from 21 U.S.C. Section 174, United States v. McGarr, supra, p. 4, and in its Legislative History and Purpose. There can be no valid comparison or equation of one with the other. The offense of conspiracy is not defined in 21 U.S.C. Section 846 and Congress did not intend to define the offense of conspiracy by that statute. 21 U.S.C. Section 846 merely provides the penalty for 'anyone who attempts or conspires' to violate that subchapter of the Drug Control Act of 1970, as more fully shown below.

3. Leyvas v. United States, 371 F. 2d 714 (9th Cir. 1967) is not authority for the proposition that no overt act is required to be set forth in a conspiracy indictment charging a violation of 21 U.S.C. Section 174. That issue was not before that Court. The indictment in that case set forth overt acts in the indictment count charging the conspiracy. The matter on that appeal involved a motion under Rule 35 after trial to correct, or modify the sentence. The Leyvas Court referred to United States v. Gardner, 202 F. Supp. 256, without analysis or reasoning. 21 U.S.C. Section 846 was not involved in Leyvas.

4. Ewing v. United States, 386 F. 2d 10 (9th Cir. 1967) does not state whether overt acts were alleged in the conspiracy count of the indictment. The statements of that Court indicate that the conspiracy count of that indictment did allege overt act(s), and that the issue presented on appeal was whether the overt act(s) had been "proved", thus showing that that Court held that an overt act was an essential element of the offense of conspiracy. (Ewing, supra, at p. 15). The Ewing Court merely cited

United States v. Gardner, 202 F. Supp. 256 (N.D.Cal. 1962), which it stated was "approved" in Leyvas v. United States, 371 F. 2d 714, 717, n. 4 (9th Cir. 1967).

5. United States v. Murray, 492 F. 2d 178, 192 (9th Cir. 1973) is not authority for the proposition of law that an overt act is not an essential element of the offense of conspiracy to violate the Drug Control Act of 1970. 21 U.S.C. Section 846 was not involved in that case. The section referred to by the Murray Court was 21 U.S.C. Section 174. Furthermore, the indictment before that court alleged six overt acts, United States v. Murray, supra, at p. 192. The appellant's challenge to the indictment was not that there was no overt act alleged, but merely that "there is nothing stated that specifically pertains to his own conduct", United States v. Murray, 492 F. 2d at 192. See, Yates v. United States, 354 U.S. 298, 334 (1956), which is a completely different problem from omission from the conspiracy count of any overt act. The statement by the Murray Court that "Under a 21 U.S.C. Section 174 conspiracy charge it is not necessary to allege any overt act was totally unnecessary to the decision. The cited authorities similarly were obiter dicta, and were based on Gardner, 202 F. Supp. 256.

6. "United States v. Singer, 323 U.S. 338 (1945)(Douglas, J.) (No overt act requirement for conspiracy offense under draft evasion statute)," is distinguished from and made inapplicable to this case by the fact that Congress showed that it intended to create a new crime of conspiracy 'arising under' the draft act, because the general conspiracy statute did not reach

the violations intended to be covered. Hammerschmidt v. United States, 265 U.S. 182 (1924).

V. "Nash v. United States, 229 U.S. 373, 378 (1913) (Holmes, J.)(Same re Sherman Act)," is distinguished from and is made inapplicable to this case because in that case the substantive offense itself was a per se crime; it was the agreement itself which was the crime; by definition of the substantive offense no overt act was essential to the substantive crime. United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1065 (1971).

It is well established that in construing a criminal statute that the court should look not merely to a single clause, or sentence, in a section, nor even to the entire section, but to the entire enactment and to the legislative history of the enactment and of the statute to determine the purpose and intent of Congress, both literally and as to the spirit of the statute. Richards v. United States, 369 U.S. 1, 11 (1961); Philbrook v. Glodgett, _____U.S._____, 95 S. Ct. 1893, 1898 (1975), and to "give effect to the legislative will". Philbrook v. Glodgett, _____U.S._____ supra; Hudson Distributors v. Eli Lilly, 377 U.S. 386, 395 (1963).

The Court, in United States v. Bass, 404 U.S. 336, 347 (1971) set forth what it described as "two wise principles which this Court has long followed" in the construction of statutes:

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'. Rewis v. United States. 401 U.S. 808, 812 (1971). See also, Ladner v. United States, 358 U.S. 169, 177 (1958); Bell v. United States, 349 U.S. 81 (1955); United States v. Five Gambling Devices, 346 U.S. 441 (1953) plurality opinion for affirmance). In various ways over the years, we have stated that 'when choice has

> to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). This principle is founded on two policies, that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). See also United States v. Cardiff, 344 U.S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should'. H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that Congress has not 'plaintly and unmistakably', United States v. Gradwell, 243 U.S. 476, 485 (1917), made it a federal crime..." (Underscoring added). United States v. Bass, 404 U.S. 336, 347-349 (1971).

It is well settled that there are no common law offenses against the United States "and that before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute." United State v. Gradwell, 243 U.S. 476, 478 (1917); United States v. Eaton, 14 U.S. 677, 687 (1891), so that if there is no statute covering a particular fact situation then there is no crime.

United States v. Rabinowich, 238 U.S. 78, 87-89 (1914) is instructive. There defendants were charged with conspiracy to violate the Bankruptcy Act. The Statute of Limitation for a violation of the Bankruptcy Act was shorter than that under the general conspiracy statute. The defendants argued that the conspiracy for which they were charged and tried "arises under the Bank

ruptcy Act," that is, it was created by the Bankruptcy Act. The Court rejected the argument stating: "We deem it more reasonable to interpret 'any offense arising under this Act' as limited to offenses created and defined by the same enactment. In reaching this conclusion, we have not merely had regard to the proximity of the clause to the context, but have attributed to Congress a tacit purpose -- in the absence of any inconsistent expression -- to maintain a long established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated." Also Braverman v. United States, 317 U.S. 49, 54, 55 (1942). If Congress had intended to make a conspiracy to violate subchapter E of Chapter 13 of the Drug Control Act of 1970, a substantive offense different and separate from that set forth in 18 U.S.C. Section 371, it would and could and should have done so"distinctly", United States v. Eaton, 141 U.S. 677, 688 (1891), and "plainly and unmistakably," United States v. Lacher, 134 U.S. 624, 628 (1890), but it did not do so. See, United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). On the contrary, Congress stated that its purpose in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 9-513, was to revise "the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations". (Underscoring added).(1970 U.S.Code Cong. and Adm. News, p. 4570; 4575, 4576). The Legislative History of the Drug Control Act of 1970 shows that Congress did not state or indicate that it intended to create a new crime, or offense, of conspiracy

as a substantive offense, or as an offense "arising under" that sub-chapter of the Drug Control Act of 1970, and which would be distinct and separate from the general conspiracy statute set forth in 18 U.S.C. Section 371 (1970 U.S. Code Cong. and Admin. News, pp. 4567, 4575, 4576). The Congressional separation of 21 U.S.C. Section 846 from the sections defining the substantive offenses evidences approval of United States v. McKenny, supra, pp. 3, and removes the elements of 21 U.S.C. Section 174 which had caused confusion to some courts. 21 U.S.C. Section 846 does not define any element of the offense of "conspiracy", because it is merely a statute setting out the penalty for the offenses denominated therein. The offense of conspiracy is defined, with or without an overt act requirement, as follows: "If two or more persons conspire to commit ...any offense". See, United States v. Rabinowich, 238 U.S. at 88 (1914); 15A C.J.S., Conspiracy, Sections 35(1), 37; e.g., 18 U.S.C. Sections 371, 241, 956. The statute is not confined to conspiracy; the statute denominates both "attempts or conspires". "Attempts" precedes "conspires". The statute uses the singular "any person" in the noun subject, and continues the singular in the adjective clause describing "any person", namely, "who attempts or conspires to commit any offense defined in this subchapter", and reaches the verb singular, "is", and the singular object of the noun, "punishable", which is the object and purpose of the statute, and then describes how, by "imprisonment or fine", etc. From the face of this section, the purpose is "punishment". It is fair to state that by the language of 21 U.S.C. Section 846,"attempts or conspires" are in pari materia, and are considered and treated equally in that statute. If bare men-

tion of the word "conspires" were considered sufficient to justify the construction of that statute as creating a separate, substantive conspiracy offense, and that in such conspiracy offense an overt act was not an element thereof, then the bare mention of the word "attempts" in 21 U.S.C. Section 846 should have a similar effect to create a separate offense and to eliminate from it the natural element of that offense of "an overt act done toward its (the crime's) commission", of "a substantial step toward commission of the crime", of that 'something more that takes the crime out of the mere preparation stage.' United States v. Mandujano, 499 F. 2d 370, 375-377 (5th Cir. 1974). The Fifth Circuit, however, in Mandujano, supra, having before it an "attempt" count under 21 U.S.C. Section 846, held that an overt act was an essential element of that offense and that it was required to be alleged in the indictment.

The offense of "attempts" and the offense of "conspires" are different and the elements constituting each offense are different. It is clearly established that one person acting alone could not commit the offense of conspiracy under any conspiracy statute. United States v. Austin-Bagley Corp., 31 F. 2d 229, 233 (2nd Cir. 1929); Lubin v. United States, 313 F. 2d 419, 423 (9th Cir. 1963); United States v. Shuford, 454 F. 2d 772, 779 (4th Cir. 1971); Romontio v. United States, 400 F. 2d 618, 619 (10th Cir.1968); United States v. Musgrave, 483 F. 2d 322, 333 (5th Cir. 1973). On the other hand, one person could commit the offense of "attempt" to commit an offense. United States v. Green, 511 F. 2d 1062, 1072 (7th Cir. 1975); United States v. Heng, 356 F. Supp. 434, affirmed 484 F.

2d 1271 (2nd Cir. 1973).

The construction of 21 U.S.C. 846, as set forth in the decision herein at pp. 445, 446, would repeal or supersede 18 U.S.C. Section 371 by judicial fiat as it applies to any offense under subchapter E of Chapter 13 of the Drug Control Act of 1970. On the other hand, Congress certainly did not state any intention in the slightest to repeal or to supersede 18 U.S.C. Section 371 as to its applicability to the Drug Control Act of 1970 and no such construction should or could be made. Labor Board v. Lion Oil Co., 352 U.S. 282, 289 (1956); Posados v. National City Bank, 296 U.S. 497, 504 (1935).

> "The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest." Red Rock v. Henry, 106 U.S. 596, 601.

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. United States v. Tynen, 11 Wall. 88, 92; Henderson's Tobacco, 11 Wall. 652, 657; General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest'. Red Rock v. Henry, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or, cumulative, or auxiliary.' There must be a 'positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.' See, also, Posados v. National City Bank, 296 U.S. 497, 504." United States v. Borden Co., 308 U.S. 188, 198, 199 (1939).

In this case, there is no repugnancy between U.S.C. Section 371 and 21 U.S.C. Section 846. Each serves a different func-

tion. The former defines the crime of conspiracy; the latter directs the punishment for a conspiracy, and for an attempt, to violate the specified sections of the Drug Control Act of 1970.

In construing the intent and purpose of Congress in enacting 18 U.S.C. Section 846, this Court should take judicial notice that in almost every, if not in every, conspiracy indictment alleging a violation of the Drug Control Act of 1970, an overt act has been alleged. This Court should also consider the fact that the trial court in this case charged the jury that an overt act was an essential element of the conspiracy offense charged by this indictment. (Tr. Min. 1747, 1748; 1795, 1796). See, Blue Chip Stamps v. Manor Drug Stores, _____U.S._____, 95 S. Ct. 1917, 1924 (1975). This Court should also consider the facts that this Court has consistently held that an overt act is an essential element of the crime of conspiracy to violate the former narcotics law. United States v. Ageuci, 310 F. 2d 817, 828 (2nd Cir. 1962,) and the present Drug Control Act of 1970. United States v. Floyd, 496 F. 2d 982, 987 (2nd Cir. 1974); United States v. Torres, 503 F.2d 1120, 1125 (2nd Cir. 1974).

If an overt act were not an essential element of the crime of conspiracy to violate subchapter E of Chapter 13 of the Drug Control Act of 1970, then no proof of an overt act would be required to convict for that crime. But this Court very specifically held in United States v. Floyd, 496 F. 2d 982, 987 (2nd Cir. 1974) that "It is axiomatic that the essential elements of a conspiracy are unlawful agreement and an overt act in pursuance of the agreement. United States v. Ageuci, 310 F. 2d 817, 828...". This Court in United States v. Torres, 503 F. 2d 1120, 1125 (2nd

Cir. 1974) went even further and held that the overt act that must be proved in order to convict is the overt act alleged in the indictment and not some other overt act. The Sixth Circuit Court of Appeals in United States v. Williams, 503 F. 2d 50, 54 (6th Cir. 1974) in deciding the issue of the sufficiency of the evidence to prove the drug conspiracy charged, held that:

> "In showing the existence of a conspiracy, two elements must be proven: An agreement between two or more persons to act together in committing an offense, and an overt act in furtherance of the conspiracy. United States v. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940); United States v. Webb, 359 F. 2d 558 (6 Cir. 1966); United States v. McGann, 431 F. 2d 1104 (5th Cir. 1970)."

It is importantly significant that the Court in Williams, supra, cited United States v. Falcone, 311 U.S. 205 (1940) as authority for the stated principle of law; the criminal conspiracy statute in that case was the predecessor to the present day 18 U.S.C. Section 371.

The Supreme Court has held that the standard for determining the sufficiency of an indictment is

> "If it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Hagner v. United States, 285 U.S. 427 (1932); United States v. Debrow, 346 U.S. 374 (1953)..." Hamling v. United States, 418 U.S. 87, 117 (1973).

Bermudez had duly moved before trial (Tr. Min. October 15, 1974, pp. 22A-32A), during trial, and at the end of the trial (1558-1562) for dismissal of this indictment.

Point II

This Court has seriously misapprehended the facts.

This Court has seriously misapprehended the facts as to the conspiracy count against the petitioner. The memorandum decision of this Court stated that:

> "The Government evidence was (that)...On November 20,1973, after being told that 'the people in the factory had new uniforms' the DEA agent met with Blanco and informed him that he was interested in purchasing a half kilo of cocaine if the quality was right. Blanco relayed this message to Fiffe who informed Diaz-Martinez, but the proposed order was too large for Diaz-Martinez to fill at that time, and he referred Fiffe to appellant Bermudez, a regular customer of the clothing store, who Fiffe had previously observed snorting cocaine with Diaz-Martinez. Bermudez met with Fiffe and Blanco at Blanco's apartment that evening to discuss the sale. Subsequently Bermudez took Fiffe to appellant Vivas' record store in Brooklyn.
>
> The next day, Blanco called the special agent and told him that the half kilo of cocaine was now available for sale. The agent met Blanco and Fiffe at Blanco's apartment and was taken to Vivas' record store where appellants Bermudez and Vivas were waiting for him in a back room. Vivas subsequently produced the half kilo of cocaine, but the transaction was not completed because the agent had not brought the $12,000 necessary to purchase the entire amount or even the $6,500 necessary to buy'a quarter', and Vivas refused to sell less than an eighth kilo." (Decision, Docket No. 75-1073, pp. 444, 445).(Matter in parentheses added).

There was no Government testimony, (and no evidence whatever) either that Fiffe asked Diaz for a 1/2 kilo of cocaine on November 20, 1973, or that Diaz referred Fife to appellant Bermudez,** or that on November 20, 1973 Bermudez met with Fiffe and Blanco on the evening of November 20, 1973 to discuss the sale, or that on November 20, 1973 Bermudez took Fiffe to Vivas' record shop. (App. Brief pp. 9-12; 38-43; 31, 32; App. R. Brief, pp. 11-20). The testimony of Government witness Fiffe was that on November 17, 1973 (709)*, or on November 19, 1973 (702, 708)(Fiffe's

*Trial Minutes
**at any time

testimony was wavering and vague) Blanco allegedly told Fiffe that DEA agent Abbott had asked Blanco for 1/2 kilo of cocaine (702). Fiffe testified that he thereupon went to Diaz and asked him to supply the 1/2 kilo (704) and that Diaz said he had none (708). Fiffe testified that by chance he saw Bermudez at the Diaz store on the morning of November 19, 1973 (711) when, as Fiffe testified, Bermudez came with his wife and child to buy clothing (711). According to Fiffe, out of the blue, he got the idea to ask Bermudez, a stranger with whom he had had no dealings except to wait on him to sell clothes to him and his wife and children, if he could supply a 1/2 kilo of cocaine. Fiffe testified that Bermudez said it could be done (715-718). Fiffe testified that on that afternoon, November 19, 1975, Bermudez returned, picked him up in a car and went with him to Blanco's apartment (719). Fiffe testified that he had nothing to do with the 1/2 kilo of cocaine (719), that the matter was solely between Blanco and Bermudez (720); Fiffe testified he made no deals with Bermudez (720). Fiffe testified as to that:

> "Well the business was between them. I was there, but they were the ones who were going to do the business, they made an appointment to meet the following day in Vivas' house" (720).

The grave problem with the testimony of Government witness Fiffe is that it was directly refuted by the testimony of DEA Agent Abbott (290-297). DEA Agent Abbott testified that from November 12, 1973 until the late afternoon of November 20, 1973 he had no contact whatever with Blanco (290); that when he received a telephone call from Blanco on the late afternoon of November 20, 1973 (290) to inspect some cocaine, and thereafter met Blanco at his apartment,

on the afternoon of November 20, 1973, that Blanco there told Abbott that Fiffe had told Blanco to tell Abbott that he (Fiffe) would deal only in quarter or half kilo quantities (294). Abbott's testimony destroyed the foundation of the Government's case against Bermudez, which, by the Government's own view of its case against Bermudez was based on Fiffe's testimony that on November 17, 1973 Blanco had told Fiffe that Abbott had told Blanco that he (Abbott) wanted a half kilo of cocaine, etc., as aforesaid pp. 16, 17, (1672). The Government exposed the falseness and baselessness of its case against Bermudez when it informed the Court, but not the jury, (App. Br. pp. 31, 32; App. R. Br. pp. 20) that after Blanco had agreed to plead guilty, the prosecutor and DEA Agent Abbott had questioned Blanco about the claims by Fiffe as to Bermudez on November 19, 1973 and that Blanco said that no such events ever occurred (734). The Government elicited testimony from its witness Fiffe that the "conspiracy" was between Blanco and Bermudez, and that Fiffe had nothing to do with that (718, 720). That was the Government's view of its case against Bermudez as stated on summation (1672-1675). The Government elicited testimony from its own witness Miranda that the alleged Diaz-Blanco-Fiffe-Miranda-Guzman 'cocaine conspiracy' ended on November 12, 1973 (944-947) and the prosecutor added emphasis to that testimony by his previous offer of proof to the Court, out of the presence of the jury, that the alleged Diaz-Blanco-Fiffe-Miranda-Guzman 'cocaine conspiracy' came to an end prior to November 19, 1973 and that they thereafter engaged in marijuana (706).

Point III

There was no basis for the Government's cross-examination of Bermudez' character witnesses.

The Government cross-examined Bermudez' character witnesses asking each if they had heard if Bermudez had been arrested on a marijuana charge. (Appellant's Brief, pp. 19-22; Appellant's Reply Brief, pp. 34-35).

Bermudez had not been arrested on a marijuana charge (App. Br. p. 21) (Appendix pp. 1a, 2a) and there was not a scintilla of evidence presented to the trial court that there was any report or rumor in the community of that. (App. Br. pp. 19-22; App. R. Br. pp. 34-35). Bermudez' only arrest was on this charge pursuant to warrant of arrest issued upon the return of this indictment (Appendix p. 1a-2a).

Point IV

There was no evidence before the Grand Jury of any conspiracy by Bermudez.

The Government showed that there was no evidence of any conspiracy by Bermudez before the Grand Jury. (App. Br., Point III; App. R. Br., Point III).

Point V

Identification of cocaine by observation is unknowable and impossible.

It is respectfully submitted that the issue here is not the exercise of discretion by the trial court to qualify a witness as an expert, but the fact that cocaine is unidentifiable by observa-

tion. No one can be qualified to identify cocaine by observation. Furthermore, "rock" formation is not evidence of "cocaine purity". On cross-examination DEA Agent Abbott admitted that "rock" formation is not any indication of cocaine purity, or of the presence of cocaine (440). "Rock" formation is the normal effect of water contamination on hundreds of powder or crystalline chemicals. This common phenomenon is exemplified by sugar after it is subjected to water contamination - it hardens into lumps.

Conclusion

It is respectfully urged that the issues presented, particularly as to the construction of 21 U.S.C. Section 846, be heard by this Court en banc, and that upon the rehearing, the judgment be reversed and the indictment be dismissed.

Dated: November 24, 1975.

Charles Sutton

Charles Sutton

Form No. 100A

CRIMINAL DOCKET

74 146 M

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. EDUARDO BERMUDEZ	For U. S.: For Defendant:

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 5 1974
TIME A.M.
P.M.

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
Fine,							
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							
Violation: Conspiracy to distribute cocaine and distribution of cocaine 21 USC 841(a)(1); 18 USC 2							

DATE	PROCEEDINGS
6-7-74	Defendant appeared before Magistrate Sear on a warrant issued in the Eastern District of New York at Brooklyn. Defendant informed of charge and advised of rights. In lieu of posting $250,000 cash bond, defendant remanded to custody of U.S. Marshal. Defendant signed waiver of removal hearing. (MLS)
	See CR 74-263 -
	Case closed

JUL 5 1974 *
TIME A.M.
P.M.

Warrant for Arrest of Defendant (Rev. 7-52) Cr. Form No. 12

TPP:DAD:mc
F.#741,783

United States District Court

FOR THE

~~EASTERN DISTRICT OF NEW YORK~~

UNITED STATES OF AMERICA

v.

EDUARDO BERMUDEZ, ET AL.

Defendants.

No. 74CR 403

To: ANY SPECIAL AGENT, DRUG ENFORCEMENT ADMINISTRATION AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK AND/OR ANY OF HIS DEPUTIES AND/OR TO ANY OTHER AUTHORIZED OFFICER:

You are hereby commanded to arrest EDUARDO BERMUDEZ and bring him forthwith before the United States District Court for the Eastern District of New York in the city of Brooklyn to answer to an indictment charging him with conspiracy to distribute cocaine and distribution of cocaine

in violation of Title 21, United States Code, Section 841(a)(1), Section 846; Title 18, United States Code, Section 2

Dated at Brooklyn, New York

on May 30, 1974

Bail fixed at $250,000 cash

USD

LEWIS ORGEL, Clerk.

By ..... Deputy Clerk.

RETURN

-2a-

District of

Received the within warrant the day of 19 and executed same.